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## Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions

Deborah Hardin Ross

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# STERILIZATION OF THE DEVELOPMENTALLY DISABLED:\* SHEDDING SOME MYTH-CONCEPTIONS

DEBORAH HARDIN ROSS

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\* Although the term "developmentally disabled" may properly be used to refer to those individuals who have cerebral palsy, epilepsy, or another neurological condition, the author uses the term to refer to mentally retarded individuals exclusively. The American Association of Mental Deficiency defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with defects in adaptive behavior and manifested during the developmental period." North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451, 453 (M.D.N.C. 1976) (footnote omitted).

*"[The Framers] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men [and women]."*<sup>1</sup>

## I. INTRODUCTION

Although it is a canon of our collective moral and legal thought that all human beings are created equal,<sup>2</sup> the developmentally disabled have historically been deprived of that conceptual and practical equality. Indeed, developmentally disabled citizens have been prevented from "fully participating in the human condition"<sup>3</sup> by social obstacles as much as by their own disabilities. The developmentally disabled have historically been perceived as *sub-human*, lacking fundamental human needs such as those for love, intimacy, and hope of achievement.<sup>4</sup> Developmentally disabled citizens have also been widely viewed as *other-human*, as a mythical entity represented by a composite portrait exhibiting all the undesirable qualities of the group as a whole.<sup>5</sup>

Within the past decade, we have witnessed the long-awaited emergence of the developmentally disabled into the world of the "truly human."<sup>6</sup> This emergence closely follows an increased recognition of fundamental rights of the mentally handicapped, such as the right to treatment,<sup>7</sup> to care in the least restrictive setting,<sup>8</sup> and

1. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

2. A negative eugenics program is implicitly based on the proposition that although "[m]en might be born equal for some purposes . . . they are not born genetically equal." Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189, 208 (1971) (footnote omitted). See also K. Schwartz, *Nature's Corrective Principle in Social Evolution* in 2 *THE HISTORY OF MENTAL RETARDATION* 149-50 (Rosen ed. 1976). For a discussion of eugenics in general see notes 12-15 and accompanying text.

3. Roos, *Psychological Impact of Sterilization on the Individual*, 1 *LAW & PSYCH. REV.* 45 (1975).

4. *Id.*

5. Bligh, *Sterilization and Mental Retardation*, 51 *A.B.A.J.* 1059, 1061 (1965) (quoting FERNALD, *THE BURDEN OF FEEBLE-MINDEDNESS* 23-24 (1912)). Throughout history, the mentally retarded citizen has been identified as: (1) a subhuman organism; (2) a menace; (3) an unspeakable object of dread; (4) an object of pity; (5) a holy innocent; (6) a diseased organism; (7) an object of ridicule; and (8) an eternal child. *LAW REFORM COMMISSION OF CANADA, STERILIZATION* 66-67 (1979). See generally, M. FOUCAULT, *MADNESS AND CIVILIZATION* (1973); B. Blatt, *Purgatory*, in 2 *THE HISTORY OF MENTAL RETARDATION* 356-57 (Rosen, ed. 1976); P. L. Howley, *Attitudes of Parents, Career Personnel, and Volunteers Toward Sex Education and Sex Participation for the Mentally Retarded* 19-20 (June 1974) (unpublished thesis in Florida State University Library).

6. Roos, *supra* note 3.

7. See, e.g., *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Wyatt v. Stickney*, 325 F. Supp. 781, 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, remanded in part, reserved in part sub. nom.* *Wyatt v. Aderholt*,

to liberty.<sup>9</sup> The right to procreative freedom, however, is slow to receive such recognition, for years of prejudice, mythology, and false assumptions have prevented realization of procreation as a 'natural' right of the developmentally disabled citizen.

The purpose of this comment is to explore the "extent to which myths, misunderstandings, and lack of knowledge within the general community contribute to [the] 'civilized' oppression"<sup>10</sup> of developmentally disabled persons. This comment shall first examine the social climate in which the nonconsensual sterilization statutes were enacted, then review the false assumptions upon which the laws are based, emphasizing the relationship between those false assumptions and the vulnerability of the statutes to constitutional attack for denial of substantive due process to the developmentally disabled citizen.

This comment will then discuss commonly accepted misunderstandings concerning consensual sterilization which turn apparent 'consensual' sterilization into a potentially more dangerous form of non-consensual sterilization. Lastly, the growing practice of court-ordered sterilization in the absence of prior statutory authority will be examined in light of its potential for breaking through old myths and misconceptions, by forcing the deciding authority to deal with the potential sterilization patient as an individual with unique characteristics and concerns. In this context we shall look at two cases, *Wyatt v. Aderholt* and *In re Guardianship of Hayes*,

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503 F.2d 1305 (5th Cir. 1974). See generally Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

In addition, the right to refuse treatment has increasingly become a recognized right of the developmentally disabled. See generally Schwartz, *In the Name of Treatment: Autonomy, Civil Commitment, and Right to Refuse Treatment*, 50 NOTRE DAME LAW. 808 (1975).

8. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966) cert. denied, 382 U.S. 863 (1965); *Dixon v. Weinberger*, 405 F. Supp. 974 (D.D.C. 1975); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) vacated and remanded on other grounds, 414 U.S. 413 (1974). But see *Pennhurst State School and Hosp. v. Halderman*, 101 S. Ct. 1531 (1981), holding that the bill of rights provision of the Developmentally Disabled Assistance and Bill of Rights Act does not create in favor of the developmentally disabled individual any substantive rights to "appropriate treatment" in the "least restrictive" environment.

9. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563 (1975), condemning Florida's custodial confinement of a non-dangerous mental patient.

For the pertinent provisions in Florida, see the Florida Mental Health Act, or the Baker Act, FLA. STAT. §§ 394.451-.477 (1979 and Supp. 1980). For a general discussion of increasingly recognized rights of the mentally disabled, see Steinbock, et al., *Civil Rights of the Mentally Retarded: An Overview*, 1 LAW & PSYCH. REV. 151 (1975).

10. Linn, *Involuntary Sterilization—A Constitutional Awakening to Fundamental Human Rights*, 2 AMICUS 34 (Feb. 1977).

both which exemplify the discarding of stereotypic conceptualization and pragmatic expediency in favor of concern for the individual.<sup>11</sup>

## II. NON-CONSENSUAL STERILIZATION UNDER STATUTORY AUTHORITY

### A. Sociological, Legislative, and Judicial Background

*"We bestow care upon the breeding of our chickens, horses and cattle; is not the human being worthy of equal care?"<sup>12</sup>*

In 1883, Sir Francis Galton<sup>13</sup> coined the term "eugenics" and defined it as "[t]he study of agencies under social control which may improve or impair the racial qualities of future generations either physically or mentally."<sup>14</sup> The eugenics movement, officially

11. *Wyatt v. Aderholt*, 368 F. Supp. 1383 (M.D. Ala. 1974). *In re Guardianship of Hayes*, 608 P.2d 635 (Wash. 1980). Even though Florida has never enacted a sterilization statute, this emerging trend of court-ordered sterilization in the absence of statutory authority makes the subject of sterilization a very relevant one for the state.

Compulsory sterilization has been supported by several Florida officials in the past. Two successive superintendents of the Florida Farm Colony for Epileptic and Feeble-Minded who served during the heyday of the eugenic movement, from 1919 to 1941, advocated the enactment of a non-consensual sterilization statute:

When we witness the ever increasing procession of the criminal, the defective, the handicapped and unfit into our jails, mental hospitals and reformatories, and consider the staggering cost of this never ending horde we stand amazed that civilization is doing so little in the way of prevention. . . . No wholesale remedy appears available, but a step towards checking this on-rushing horde now devouring civilization would be the surgical sterilization of every feeble-minded person coming within the purview of the law, thus precluding them from reproducing their kind. . . . And, at first would only reach comparatively few, but as the years go on thousands and hundreds of thousands would be denied the power of spreading throughout the land his or her defective progeny. Can civilization stand the strain if nothing is done to lessen or stop it?

EIGHTH BIENNIAL REPORT OF THE SUPERINTENDENT OF THE FLORIDA FARM COLONY FOR EPILEPTIC AND FEEBLE-MINDED 7 (1935).

12. Kenyon, *Sterilization of the Unfit*, 1 VA. L. REV. 458, 466 (1914).

13. John Humphrey Noyes, a Perfectionist Minister, is credited with being the first American to formally advocate human betterment programs in 1848. Bender, *A Geneticist's Viewpoint Toward Sterilization*, 2 AMICUS 45 (Feb. 1977). But the ideas are far from new. Plato wrote:

The principle has been already laid down that the best of either sex should be united with the best as often, and the inferior with the inferior, as seldom as possible; and that they should rear the offspring of the one sort of union, but not of the other, if the flock is to be maintained in first-rate condition.

PLATO, *REPUBLIC*, CH. V, 459 (Jowett Translation).

14. The word *eugenics* is derived from a Greek word meaning well-born. LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 25.

launched by 1904, was based on the assumption that certain types of individuals were more socially desirable than others. Persons possessing more desirable traits should be encouraged to propagate so as to protect or improve the gene pool (positive eugenics), while other less desirable persons should be prohibited from increasing their kind (negative eugenics).

The eugenics movement thrived in response to events occurring at the end of the nineteenth century. The rediscovery of Mendel's laws of heredity and the development of a relatively safe and simple surgical technique for the prevention of procreation provided both theory and technique to the Galtonian ideology. Although Mendel's work had been limited to the transmission of simple traits in plants, eugenicists asserted that Mendel's findings concerning heredity were equally applicable to complex traits in human beings. Eugenicists argued that mental illness, retardation, epilepsy, criminality, and various other social defects were hereditary, and therefore, could be eliminated from the gene pool through proper measures such as sexual sterilization of the "unfit."<sup>15</sup>

A few years prior to the rediscovery of Mendel's laws, Dr. Harry C. Sharp of the Indiana State Reformatory developed a technique for sterilizing males (vasectomy), while at the same time in France, a method for sterilizing females (salpingectomy) was being perfected. Sharp reportedly sterilized approximately 700 boys at the Indiana Reformatory well before the Indiana sterilization statute was passed.<sup>16</sup>

The legislative history of eugenic sterilization began in 1897 in Michigan with the introduction and subsequent defeat of a bill authorizing involuntary sterilization. Eight years later, Pennsylvania passed a sterilization bill entitled "An Act for the Prevention of Idiocy," but Pennsylvania Governor Pennypacker vetoed the bill and returned it to the legislature with this message:

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15. In May 1911, the Research Committee of the Eugenics Section of the American Breeders Association postulated ten remedies "for purging from the blood of the [human] race the innately defective strains:" (1) life segregation; (2) sterilization; (3) restrictive marriage laws and customs; (4) eugenic education of the public and prospective mates; (5) systems of mating purporting to remove defective traits; (6) environmental betterment; (7) polygamy; (8) euthanasia; (9) Neo-Malthusianism; (10) laissez-faire. The Committee advocated the first two remedies as possessing the greatest potential. *Id.*

16. Other zealous eugenicists included F. Hoyt Pilcher, Superintendent of the Winfield Kansas State Home for the Feeble-Minded, who castrated forty-four boys and fourteen girls in the mid-1890's. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?* 27 OHIO ST. L.J. 591, 592 (1966).

This bill has what may be called with propriety an attractive title. If idiocy could be prevented by an Act of Assembly, we may be quite sure an act would have long been passed and approved in this State. . . . It is plain that the safest and most effective method of preventing procreation would be to cut the heads off the inmates, and such authority is given by the Bill to this staff of scientific experts. . . . A great objection is that the bill . . . would be the beginning of experimentation upon living human beings, leading logically to results which can readily be forecasted.<sup>17</sup>

Two years later, in 1907, Indiana enacted the first compulsory sterilization law. The statute, however, was declared unconstitutional in 1921, as were other similar statutes in Michigan, New Jersey, and New York, prior to 1925.<sup>18</sup>

It was in 1927 that advocates of eugenic sterilization won their most important victory, a victory which has fueled the eugenic movement to this day. The United States Supreme Court upheld the validity of a Virginia sterilization statute against several cogent constitutional attacks in the case of *Buck v. Bell*.<sup>19</sup> Mr. Justice Holmes, speaking for the Court, held that the Virginia law was a reasonable regulation under the state's police power and was not a violation of either the due process or equal protection clause of the fourteenth amendment.

The plaintiff, Carrie Buck, was an eighteen-year-old woman committed to the Virginia State Colony for Epileptics and Feeble-Minded. Carrie was the daughter of a feeble-minded woman and the mother of an allegedly<sup>20</sup> feeble-minded child. The Virginia statute under which officials sought to have Carrie sterilized was premised on the assumption that the state supported in institutions "many defective persons who if now discharged would be-

17. S. BRAKEL AND R. ROCK, *THE MENTALLY DISABLED AND THE LAW* 208 (1971) (citing Vetoes by the Governor of Bills Passed by the Legislature, Session of 1905, p. 26).

18. *Williams v. Smith*, 131 N.E. 2 (Ind. 1921); *Smith v. Board of Examiners of Feeble-minded*, 88 A. 963 (N.J. 1913); *Haynes v. Lapeer Circuit Judge*, 166 N.W. 938 (Mich. 1918); *In re Thompson*, 103 Misc. 23, 169 N.Y.S. 638 (Sup. Ct. 1918), *aff'd mem. sub nom. Osborn v. Thompson*, 185 App. Div. 902, 171 N.Y.S. 1094 (3d Dep't 1918).

19. *Buck v. Bell*, 274 U.S. 200 (1927).

20. Evidence reveals that Carrie's daughter was not mentally retarded at all, but was labeled defective at the age of one month by a Red Cross nurse. By the time the child had finished second grade, she was reportedly very bright. In addition, Carrie's mother was only mildly retarded which, in the terminology of the day meant that she was a moron, not an imbecile. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 *TEMPLE L.Q.* 995, 1006-7 (1977).

come a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society."<sup>21</sup> Responding to the substantive due process arguments raised by plaintiff's counsel, Justice Holmes wrote:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.<sup>22</sup>

21. 274 U.S. at 205-06.

22. *Id.* at 207 (citations omitted). It is interesting to note that the nonconsensual eugenic sterilization statute at issue in *Buck* was repealed by the Virginia legislature years later and that a consensual sterilization procedure was enacted in its stead. The contrast between the two statutes is striking; the difference between the stated purposes reflects the shedding of some misconceptions, and the more elaborate standards exhibited by the present Virginia statute reflect an increased concern for the developmentally disabled individual.

The Virginia nonconsensual sterilization act (Acts 1924, Ch. 394, p. 569) read in part as follows:

Whereas, both the health of the individual patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives under careful safeguard and by competent and conscientious authority; and

Whereas, the Commonwealth has in custodial care and is supporting in various State institutions many defective persons who if now discharged or paroled would likely become by the propagation of their kind a menace to society but who if incapable of procreating might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society; and

Whereas, human experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime; now, therefore,

1. Be it enacted by the General Assembly of Virginia, that whenever the Superintendent . . . shall be of opinion that it is for the best interests of the patients and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent is hereby authorized to perform . . . the operation of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy. . . .

*Buck v. Bell*, 130 S.E. 516, 517 n.1 (Va. 1925).

The Virginia consensual sterilization statute presently in effect reads in part as follows:

§ 54-325.11. Sterilization operations for certain adults incapable of informed consent.—It shall be lawful . . . to perform a . . . sexual sterilization procedure on a person eighteen years of age or older, who does not have the capacity to give informed consent to such an operation, when:



*Buck v. Bell* sparked the introduction of numerous eugenic sterilization bills; twenty statutes were passed in the ten years following the Supreme Court decision.

### B. Analysis of Present Statutes

At present, nine states have nonconsensual sterilization statutes.<sup>23</sup> Since 1970, nine state legislatures have repealed their sterilization statutes,<sup>24</sup> while one statute has become inoperative by

3. The court has determined that a full, reasonable, and comprehensible medical explanation as to the meaning, consequences, and risks of the sterilization operation to be performed and as to alternative methods of contraception has been given by the physician to the person upon whom the operation is to be performed, to the person's guardian, if any, to the person's spouse, if any, and, if there is no spouse, to the parent;

4. The court has determined (i) that the person has been adjudicated incompetent . . . and (ii) that the person is unlikely to develop mentally to a sufficient degree to make an informed judgment about sterilization in the foreseeable future;

5. The court, to the greatest extent possible, has elicited and taken into account the views of the person concerning the sterilization, giving the views of the person such weight in its decision as the court deems appropriate;

6. The court has complied with the requirements of § 54-325.12;

§ 54-325.12. Standards for court-authorized sterilization of certain persons.—A. In order for the circuit court to authorize the sterilization of a person . . . it must be proven by clear and convincing evidence that:

1. There is a need for contraception. The court shall find that the person is engaging in sexual activity at the present time or is likely to engage in sexual activity in the near future and that pregnancy would not usually be intended by such person if such person were competent and engaging in sexual activity under similar circumstances;

2. There is no reasonable alternative method of contraception;

3. The proposed method of sterilization conforms with standard medical practice, and the treatment can be carried out without unreasonable risk to the life and health of the person; and

4. The nature and extent of the person's mental disability renders the person permanently incapable of caring for and raising a child. The court shall base this finding on empirical evidence and not solely on standardized tests.

B. The criteria set out in subsection A of this section shall be established for the court by independent evidence based on a medical, social, and psychological evaluation of the person upon whom the sterilization operation is to be performed.

23. ARK. STAT. ANN. §§ 59-501—502 (1971); DEL. CODE ANN. tit. 16, §§ 5701-5705 (1974); ME. REV. STAT. ANN. tit. 34, §§ 2461-2468 (1964); MISS. CODE ANN., § 41-45-1—19 (1972); N.C. GEN. STAT. §§ 35-36—50 (1976); OKLA. STAT. ANN. tit. 43A, §§ 341-346 (1979); S.C. CODE §§ 44-47-10—100 (1976); UTAH CODE ANN. §§ 64-10-1—13 (1953); W. VA. CODE §§ 27-16-1—5 (1980). Maine has both a non-consensual and consensual portion of its statute. Although North Carolina requires the consent or objection of the patient and kin to be recorded, neither is controlling. For this reason, the author treats the North Carolina statute as non-consensual.

24. 1974 Ariz. Sess. Laws ch. 185 § 1 repealing ARIZ. REV. STAT. ANN § 36-531—540 (1956). 1979 Cal. Stats. c. 552 § 1, c. 730 § 156.5 repealing CAL. WELF. & INST. CODE § 7254

court decision.<sup>25</sup> While the total number of sterilizations performed each year pursuant to these statutes has dropped significantly since 1950,<sup>26</sup> the unchallenged statutes leave open the potential for an increase in the exercise of the power to sterilize. This is a cause for concern to those who find the empirical basis for any genetic rationale unpersuasive, as well as to those who are committed to a "natural" right theory of procreative freedom.

### 1. *To Whom Applied*

Seven of the nine nonconsensual sterilization statutes explicitly apply to individuals who are mentally ill and to those who are mentally retarded; Utah's statute applies only to residents of a mental retardation facility, while West Virginia's statute seemingly applies to any individual who has been declared mentally incompetent. In addition, four states (Delaware, Mississippi, Oklahoma, and South Carolina) extend the application of their statutes to epileptics.

### 2. *Procedure*

Although the United States Supreme Court has not had occasion to determine the minimum standards for procedural due process applicable in the context of sterilization, legal authority suggests that non-consensual sterilization statutes should provide at a minimum:

1. Personal notice to the person subject to sterilization, and if that person is unable to comprehend what is involved or is a minor, notice to the individual's legal representative, guardian, or nearest relative;

2. A hearing by the board or court designated in the statute to determine the propriety of the prospective sterilization. At such hearing, evidence may be presented, and the patient must be present and/or represented by counsel, guardian, or relative;

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effective Jan. 1, 1980. 1972 Idaho Sess. Laws ch. 21 § 1 repealing IDAHO CODE § 66-801—812 (1947). 1974 Ind. Acts, P.L. 60 § 1 repealing IND. CODE ANN. § 16-13-13-1—16-13-16-1 (1973). 1977 Iowa Acts ch. 77 § 1 repealing IOWA CODE ANN. § 145.1-.22 (1972). 1974 Mich. Pub. Acts No. 258 § 1106 repealing MICH. COMP. LAWS § 720.301-310 (1968). 1975 N. H. Laws 43:1 repealing N.H. REV. STAT. ANN. § 174:1—:14 (1964) 1979 N.D. Sess. Laws ch. 93, § 1 repealing N.D. CENT. CODE § 25-04.1-02—08 (1967). 1974 S.D. Sess. Laws ch. 187 repealing S.D. CODIFIED LAWS ANN. § 27-11-1—6.

25. The United States District Court for the Middle District of Alabama ruled the Alabama statute unconstitutional in *Wyatt v. Aderholt*, 368 F. Supp. 1382 (1974).

26. Ferster, *supra* note 16, at 614.

3. An opportunity to appeal the board's ruling to a court of competent jurisdiction.<sup>27</sup>

An examination of the nine state statutes currently in effect reveals that not all of these procedural requirements are being met. Six of the statutes are applicable only to institutionalized persons (Delaware, Minnesota, Mississippi, Oklahoma, South Carolina, Utah); in all of these, the superintendent or director of the institution initiates the procedure by petitioning a board or court for sterilization. In the three states whose statutes are applicable to both institutionalized and non-institutionalized individuals, the county director of social services (North Carolina), guardian, parent (Georgia), or the committee or authority responsible for such individuals (West Virginia) may petition for sterilization. All statutes except Delaware's require notice to be served upon the individual, and all require notice to be given to a guardian or relative when the patient is incompetent or a minor.

Only seven of the statutes provide for a hearing to determine the appropriateness of the sterilization request (Arkansas, Mississippi, North Carolina, Oklahoma, South Carolina, Utah, West Virginia). The hearing may be before the board of trustees of the mental institution (Mississippi), a State Board of Affairs (Oklahoma), a Department of Health and Environmental Control (South Carolina), or the district court (Arkansas, North Carolina, Utah, West Virginia). Five of the seven statutes requiring a hearing also provide that the patient should appear at the hearing (Arkansas, Mississippi, Oklahoma, South Carolina, West Virginia). All of the seven statutes provide for the appointment of a guardian *ad litem* to defend the rights and interests of the patient, but only three of the statutes expressly indicate that the patient is entitled to present and cross-examine witnesses on his/her own behalf (Arkansas, North Carolina, West Virginia). All of the seven statutes allow for an appeal to be taken from the order entered after the hearing to the appropriate tribunal.

### 3. *Justification for Sterilization*

Six of the nine non-consensual sterilization statutes expressly

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27. In *Buck v. Bell*, 274 U.S. 200, 207, the Court simply stated that the patient "has had due process of law." POZGAR, *LEGAL ASPECTS OF HEALTH CARE ADMINISTRATION* 142 (1979). See also KITTRIE, *THE RIGHT TO BE DIFFERENT* 322 (1971); BRAKEL AND ROCK, *supra* note 17, at 214-216 (1971).

state the premise upon which sterilization is based. All of the six are based on eugenic premises (Minnesota, Mississippi, North Carolina, Oklahoma, South Carolina, West Virginia); two of those six also express an environmental premise<sup>28</sup> (North Carolina, West Virginia), and one, fiscal concerns (Oklahoma).<sup>29</sup>

#### 4. Standards

The standards for obtaining a sterilization order vary widely among the states. The Delaware statute requires merely a finding that "procreation is inadvisable;"<sup>30</sup> Utah specifies only that the "interests of institutionalized residents or of society" and a compelling state interest be found to require such sterilization.<sup>31</sup> Other statutes explicate more elaborate standards, such as the Oklahoma statute, which specifies that the petitioner prove:

1. patient is the potential parent of "socially inadequate offspring likewise afflicted,"
2. patient may be sterilized without detriment to his/her health,
3. welfare of society and patient will be promoted, or,
4. patient will continue to be a public or partial charge or supported in any manner or form by charity.<sup>32</sup>

#### C. Substantive Due Process

Statutes authorizing the non-consensual sterilization of developmentally disabled persons have traditionally been challenged on the grounds that they: (1) impose cruel and unusual punishment;<sup>33</sup> (2) classify and treat persons in violation of equal protection of the laws;<sup>34</sup> (3) authorize a "taking" in the absence of procedural due

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28. See text accompanying footnotes 86-93.

29. See text accompanying footnotes 110-117.

30. DEL. CODE ANN. tit. 16, § 5701 (1974).

31. UTAH CODE ANN. § 64-10-1, 4 (1976).

32. OKLA. STAT. ANN. tit. 43A, § 342 (1979).

33. See, e.g., *State v. Feilen*, 126 P. 75 (Wash. 1912), the first case in which the inherent cruelty of sterilizing a convicted felon was examined. See generally Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States*, 43 CHI.-KENT L. REV. 125-30 (1966).

34. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942), holding unconstitutional an Oklahoma statute which excepted from its operation persons convicted of embezzlement, but not those convicted of larceny; *Smith v. Board of Examiners of Feeble-minded*, 88 A. 963 (N.J. 1913). See also *Ruby v. Massey*, 452 F. Supp. 361 (D. Conn. 1978), holding state action of making sterilization available only to institutionalized patients to be violative of

process;<sup>35</sup> and (4) infringe upon fundamental rights beyond the reasonable exercise of the state's police power.<sup>36</sup> Although the courts generally have been unresponsive to substantive due process claims, this last constitutional guarantee will be given more serious and renewed attention as the rights of the developmentally disabled citizen are reviewed in light of modern knowledge of genetics and child-development.

Two legal theories have been advanced attacking the constitutional validity of non-consensual sterilization statutes. The first theory centers around the due process requirement that non-consensual sterilization must be "necessary" in order to achieve a compelling state interest. Demonstration of a compelling state interest depends upon the scientific validity of the premises upon which the statutes are based. The proponents of invalidation of sterilization statutes on constitutional grounds believe that the original premises are erroneous. They conclude, therefore, that non-consensual sterilization deprives the developmentally disabled patient of his/her liberty without due process of law.

The second theory regards procreation as a fundamental or 'natural' liberty which cannot be interfered with by any governmental order, regardless of the scientific or empirical validity of that order. Under a compelling state interest paradigm, proponents of this view suggest that the right of procreation far outweighs any contribution to the public welfare made by involuntary sterilization so that the level of a compelling state interest is never achieved. Under a more normative approach, adherents to the view argue that government should have no voice in or control over the procreative decision.

There are . . . certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are eternal to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws

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equal protection. See generally Kindregan, *supra* note 1, at 130-32; Note, *Legislative Naivete in Involuntary Sterilization Laws*, 1976 WAKE FOREST L. REV. 1064, 1079-80 (1976).

35. For a discussion of minimum procedural due process rights, see text accompanying notes 175-202 *infra*. See also Comment, *Sterilization, Retardation, and Parental Authority*, 1978 B.Y.U.L. REV. 380, 407 (1978).

36. *Smith v. Board of Examiners of Feeble-minded*, 88 A. 963 (N.J. 1913).

are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.<sup>37</sup>

### 1. *No Compelling State Interest*

In determining whether an exercise of the state's police power affecting individual rights comports with the substantive due process guarantee of the Constitution, the courts traditionally have balanced the interest which the state seeks to promote or protect against the nature of the asserted right.<sup>38</sup> The court "consider[s] private deprivation, societal benefits, and possibilities of the state realizing those benefits at a lower cost."<sup>39</sup> When deprivation of a fundamental right is not at stake, a statute must bear a rational relation to a permissible state interest or concern.<sup>40</sup> In this instance the court entertains a presumption of rational correctness in favor of the judgment of the legislature as the body of the people's elected representatives.<sup>41</sup> When fundamental rights or personal liberties are involved, however, constitutional standards require a more rigorous test and process of review. The state may prevail only by showing an overriding, compelling state interest to be achieved by the legislation.<sup>42</sup> Under a compelling state interest analysis, the court must strictly scrutinize the legislation to find an interest for which the legislation is both a necessary<sup>43</sup> and, in method or implementation, least intrusive measure conducive to the legislative purpose.<sup>44</sup>

The United States Supreme Court has firmly established one's

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37. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928). See *Griswold v. Connecticut*, 381 U.S. 479, 511 n.4 (Black, J., dissenting), for a collection of the "catchword" sources of the natural justice philosophy.

38. *Barenblatt v. United States*, 360 U.S. 109 (1959).

39. *Cavitt v. Cavitt*, 157 N.W.2d 171, 180 (Neb. 1968).

40. *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451, 458 (M.D.N.C. 1976).

41. *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *In re Sterilization of Moore*, 221 S.E.2d 307, 314 (N.C. 1976).

42. See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 684 (1977); *Bates v. Little Rock*, 361 U.S. 516 (1960). But see *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976), suggesting that a less rigorous test of "any significant state interest" be used when a minor is involved.

43. *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The court will not assume any factual situation in order to validate the statute. *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969).

44. *Shelton v. Tucker*, 364 U.S. 479 (1960).

personal control over procreative decisions as a fundamental constitutional right encompassed by a recognized zone of privacy protected by the fourteenth amendment.<sup>45</sup> In *Skinner v. Oklahoma*, the Court outlined the fundamental nature of the interest involved: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."<sup>46</sup> More recently, in *Eisenstadt v. Baird*, the Court, in striking down a statute proscribing the use of contraceptives, reiterated: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>47</sup>

It is clear, then, that in order for non-consensual sterilization to withstand constitutional scrutiny, it must be a necessary and least possible intrusive means of fulfilling a compelling state interest. Part (a) of this comment addresses the necessity requirement by discussing the misconceptions underlying compulsory sterilization legislation; part (b) addresses the second requirement by looking at other less intrusive alternatives to sterilization.

#### *a. Justifications and False Assumptions*

*Eugenic*—The eugenic movement of the early twentieth century was based on at least three premises: (1) certain types of social deficiencies are hereditary; (2) a fast-paced biological deterioration of the gene pool and, therefore, of the human race is occurring; (3) certain types of socially unfit persons are contributing relatively more to that deterioration by their lack of sexual self-control and consequent high level of fecundity. All of these premises were explicitly or implicitly accepted, and thereby strengthened, by the United States Supreme Court in *Buck v. Bell*.<sup>48</sup> Although these premises may underlie arguments in favor of non-consensual sterilization today, in large measure they have been refuted by advances in genetic research and related scientific study.

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45. The right to privacy encompasses matters such as abortion, *Roe v. Wade*, 410 U.S. 113 (1973); contraception, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and marriage, *Loving v. Virginia*, 388 U.S. 1 (1967). For cases extending protection to minors, see *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

46. 316 U.S. 535, 541 (1942).

47. 405 U.S. 438, 453 (1972) (emphasis in original).

48. 274 U.S. 200.

The notion that mental deficiency and other socially undesirable characteristics are hereditary has been prevalent throughout history. Samuel G. Howe reported to the Senate of the Commonwealth of Massachusetts in 1848 that mental deficiency was a hereditary taint inflicted upon those parents who violate certain "natural laws":

The moral to be drawn from the existence of the individual idiot is this,—he, or his parents, have so far violated the natural laws, so far marred the beautiful organism of the body, that it is an unfit instrument for the manifestation of the powers of the soul. . . . [A] very large class of persons ignore the conditions upon which alone health and reason are given to men, and consequently they sin in various ways . . . and thus bring down the awful consequences of their own ignorance and sin upon the heads of their unoffending children.<sup>49</sup>

Howe cited intemperance, masturbation, intermarriage of relatives, and attempted procurement of abortion as the sins of the parents which resulted in the mental retardation of their children.<sup>50</sup>

The notion that mental deficiency is hereditary was fueled in large part by the results of genealogical studies of certain "royal families" of the feeble-minded.<sup>51</sup> The Jukes family, allegedly containing over 1200 mentally defective members,<sup>52</sup> was compared to the descendants of Jonathan Edwards, whose impressive statistics appeared in a medical journal of the day.<sup>53</sup> Referring to the Jukes study and other study results, one doctor asked, "Which is to be considered, the individual of this stamp or the public?"<sup>54</sup>

The validity of these familiar studies has been thrown into doubt. Dr. Abraham Myerson writes:

Without in the least denying the important role of heredity, it can only be stated that low cultural level, especially occurring in

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49. S. G. Howe, *On the Causes of Idiocy*, in ROSEN, ET AL., 1 THE HISTORY OF MENTAL RETARDATION 31, 34 (1976).

50. *Id.*

51. Myerson, *Certain Medical and Legal Phases of Eugenic Sterilization*, 52 YALE L.J. 618, 622 (1943).

52. Kenyon, *supra* note 12, at 467.

53. *Id.* at 469. Those statistics included: 395 college graduates, 65 college professors, 13 college presidents, 60 physicians, 100 clergymen and missionaries, 75 military officers, 60 prominent authors, 100 lawyers, 30 judges, and 80 public officials, including a vice-president of the United States and three United States senators.

54. *Id.* at 467-68 (quoting Dr. N. W. Barr).



sequestered groups, has been called feeble-mindedness on very scanty and insufficient evidence—evidence which any court of law would throw out as the worst sort of irrelevance and which science should not even consider.<sup>55</sup>

Beginning in the early 1930's, biologists and researchers began to retreat from the view that *all* forms of mental deficiency are hereditary. The American Neurological Association in 1936 publicly expressed concern that eugenic sterilization statutes were based on a presumption of heredity which was far from certain.<sup>56</sup> One year later, the American Medical Association reiterated that sentiment when it reported:

Our present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons. . . . There is conflicting evidence regarding the transmissibility of epilepsy and mental disorders.<sup>57</sup>

Today there are over 200 known causes of mental retardation.<sup>58</sup> Most all of the known and unknown causes could be subsumed under the following three classifications: (1) mental retardation genetically transmitted; (2) mental retardation resulting from physical damage to or maldevelopment of the brain; and (3) mental retardation due to environmental deprivation.<sup>59</sup> Even for mental retardation which is based solely on genetic factors, sterilization would not significantly reduce the incidence of retardation, for many genetic causes of retardation are transmitted by phenotypically-normal parents.<sup>60</sup> When account is also taken of mental retardation which is not based solely on genetic factors, it becomes evident that the protection of substantive due process is lacking, for non-consensual sterilization statutes cannot possibly accomplish or

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55. Myerson, *supra* note 51, at 622.

56. Ferster, *supra* note 16, at 603 (quoting COMMITTEE OF THE AMERICAN NEUROLOGICAL ASSOCIATION, *EUGENICAL STERILIZATION* 178 (1936)).

57. *Id.* (quoting AMERICAN MEDICAL ASSOCIATION, *PROCEEDINGS* 54 (May 1937)).

58. CONLEY, *THE ECONOMICS OF MENTAL RETARDATION* 11 (1973). For a general discussion of the causes of retardation, see LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 12-13. Recent authority suggests that over forty percent of recognized mental defects are still attributed to "unknown causes." Bender, *A Geneticist Viewpoint Towards Sterilization*, 2 *AMICUS* 45, 47 (Feb. 1977).

59. Conley, *supra* note 56, at 11.

60. KITTRIE, *supra* note 27, at 374. Even if all known defectives could be sterilized, there would only be an eleven percent reduction of mental deficiency in the next generation. *Id.*

even advance their stated eugenic goal.

Downs Syndrome provides an example of retardation resulting solely from inheritance of a defective gene, which in this case is most often a mutation of the mother's gene associated with advancing age.<sup>61</sup> The mutation does not cause retardation in the mother. An *effective* eugenic program, however, would necessitate the sterilization of phenotypically-normal persons, like the mother, who carry a defective gene and who would not or could not refrain from reproduction through normal contraceptive measures. The practical problems, such as identification of carriers,<sup>62</sup> as well as the ethical problems of compulsory control through sterilization, are obvious, especially when one remembers that phenotypically-normal carriers are up to thirty times more numerous than persons exhibiting the defective traits.<sup>63</sup>

Because statutes which impact upon fundamental rights must be effective, as well as narrowly and exactly drawn to fulfill the underlying compelling state interest,<sup>64</sup> current statutes authorizing the sterilization only of the retarded may be constitutionally infirm as under-inclusive on this basis.<sup>65</sup>

In some cases, the genetic defect does not determine retardation, but must combine with environmental factors for the defect to be exhibited. For example, phenylketonuria (PKU) is a genetically transmitted disease associated with retarded intellectual growth caused by the failure of a liver enzyme to metabolize the amino acid phenylalanine.<sup>66</sup> Children who test positively for PKU are placed on a special diet consisting wholly of a formula which is low

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61. Murdock, *Sterilization of the Retarded: A Problem or a Solution?* 62 CAL. L. REV. 917, 924-25 (1974).

62. *Id.* at 924.

63. Bligh, *supra* note 5, at 1062.

64. *Roe v. Wade*, 410 U.S. 113, 155 (1973). *NAACP v. Button*, 371 U.S. 415, 438 (1963).

65. Murdock, *supra* note 61, at 927. In addition, statutes may be over-inclusive as being applicable to classes of persons without regard to the dominant or recessive nature of the inheritable gene. *Id.* For instance, Tay-Sachs, a disease associated with mental retardation, is transmitted by a recessive gene, thereby causing retardation only in those persons who are homozygous, that is, only when both genes governing the trait are defective. Thus, if one parent is homozygous-recessive (therefore retarded) while the other parent is heterozygous, a fifty percent chance exists that the offspring will be retarded. Where both parents are heterozygous (phenotypically-normal but Tay-Sachs gene carriers), the level drops to a twenty-five percent chance of conceiving an affected offspring. Only in cases where both parents are homozygous recessive is there virtual certainty of inherited retardation. By contrast, in cases such as those involving Downs Syndrome, where retardation is transmitted by a dominant gene, retardation will appear statistically in fifty percent of the offspring. *Id.* at 926. See also LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 39-41.

66. MNOOKIN, CHILD, FAMILY AND STATE 410 (1978).

in phenylalanine, for it is believed that dietary control can arrest mental retardation in the PKU-positive child.<sup>67</sup> The example is illustrative of the fact that with retardation caused by the interplay of genetic and environmental factors, identifying and controlling the relevant environmental factors may be all that is necessary to avoid the expression and transmission of retardation.

A second known cause of mental retardation is physical damage to or maldevelopment of the brain resulting from infections in the mother during pregnancy or in the infant after birth, ingestion of toxic substances by the mother during pregnancy or by the infant after birth, injuries occurring at birth, or accidents occurring among children.<sup>68</sup> As with retardation caused by the influence of environmental factors upon genetic defects, sterilization is inappropriate in these circumstances.

Finally, retardation may result from an impoverished intellectual and emotional environment which deprives young children of necessary mental and developmental stimulation.<sup>69</sup> The state may rationalize sterilization in this context only if it assumes all children are predestined to be culturally deprived.<sup>70</sup> An examination of other less drastic alternatives to sterilization reveals that the state must undertake affirmative steps to alleviate the cultural deprivation before it may restrict the right of procreation.

Another misconception which fueled the passage of eugenic sterilization statutes in the early part of the century was the belief "[t]hat the degeneracy of the race [is] growing far beyond the normal increase of the population."<sup>71</sup> The sterilization statutes were "expressive of a state policy apparently based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded, and insane, our race is facing the greatest peril of all time."<sup>72</sup> Sterilization advocates asked, "How are we . . . to overcome the evil and stem the flow of this rising tide?"<sup>73</sup> and answered, "There is but one remedy, *and that is sterilization.*"<sup>74</sup>

The American Neurological Association in 1936 was among the first to question this eugenic assumption. The Association con-

67. *Id.*, at 411-13.

68. Conley, *supra* note 58, at 11.

69. Murdock, *supra* note 61, at 927.

70. Conley, *supra* note 58, at 11.

71. Kenyon, *supra* note 12, at 465 (quoting Dr. Henri Bogart's statement in the Texas Medical Journal for February, 1911).

72. Shartel, *Sterilization of Mental Defectives*, 24 MICH. L. REV. 1, 18 (1925).

73. Kenyon, *supra* note 12, at 464.

74. *Id.* (emphasis in original).

cluded that "[t]here is nothing to indicate that mental disease and mental defect are increasing, and from this standpoint there is no evidence of a biological deterioration of the race."<sup>75</sup> In addition, in 1943, Dr. Abraham Myerson discounted the threat of increasing biological deterioration. He wrote:

Certain myths must be dispelled in order to view the problem realistically. One argument made for widespread sterilization is that the number of insane is increasing by leaps and bounds and, therefore, the race is threatened in a serious way by the propagation of the unfit. It is true that the admission rate to hospitals for mental disease has gone up enormously within the past few generations. But a growing public consciousness that mental disease is treatable has been almost solely responsible for this increase.<sup>76</sup>

Myerson cited as countervailing forces to increases in mental disease a lower marriage rate, higher divorce rate, greater death rate, and lower birth rate among mentally handicapped persons.<sup>77</sup> Myerson also cited the simple fact that society has become more conscious of mental condition: "A feeble-minded shepherd would not be particularly noticed. But a moron trying to operate machinery would show his defectiveness very quickly."<sup>78</sup>

A peculiar myth concerning the sexuality of the developmentally disabled person contributed to the fear which fueled the eugenic movement. As a 1914 article concluded, "It is a well-known fact that exaggerated sexuality is a marked characteristic of the imbecile,"<sup>79</sup> and "wheresoever they come in contact with those of the opposite sex they have no power of controlling the sexual impulse."<sup>80</sup> A report to the governor of Kansas in 1919 perpetuated the myth: "All the feeble-minded lack self-control. . . . Their immoral tendencies and lack of self-control make the birth rate

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75. Ferster, *supra* note 167, at 602 (quoting COMMITTEE OF AMERICAN NEUROLOGICAL ASSOCIATION, *EUGENICAL STERILIZATION* 56 (1936)).

76. Myerson, *supra* note 51, at 626. The superintendent of the Florida Farm Colony for Epileptic and Feeble-Minded expressed concern in 1922 that while the increase of the general population from 1880 was 110%, the increase of patients with mental disease during the same period was allegedly 468%. SECOND BIENNIAL REPORT OF THE SUPERINTENDENT OF THE FLORIDA FARM COLONY FOR EPILEPTIC AND FEEBLE-MINDED 16 (1922).

77. *Id.* at 627.

78. *Id.* at 628.

79. Kenyon, *supra* note 12, at 467.

80. *Id.* at 465. See also I. Kerlin, MORAL IMBECILITY in ROSEN, ET AL., 1 THE HISTORY OF MENTAL RETARDATION 304-310 (1976).

among them unusually high."<sup>81</sup>

Once again, the American Neurological Association responded to this fear. "The reputedly high fecundity of the mentally defective groups . . . is a myth based on the assumption that those who are low in the cultural scale are also mentally and biologically defective."<sup>82</sup> A more recent authority concludes, "Mental retardates share . . . the popular perception of 'less-than-humanness' and likewise become the target and repository of a cluster of fears that are felt to assault our humanness in general. Among these fears, unabated sexual appetite ranks high."<sup>83</sup>

One authority suggests that society's own myths and fears concerning sex have been amplified and projected onto the developmentally disabled individual.<sup>84</sup> Because of this fear, society has forced the developmentally disabled individual to deny his/her sexuality. When the individual naturally could not deny this part of humanhood and consequently showed signs of sexual development, society conceptualized and treated the individual—and the group as a whole—as a "sexual monster."<sup>85</sup>

To summarize, the eugenicists argue that non-consensual sterilization is needed to retard the deterioration of the race caused by mental inferiority passed to future generations by a rapidly propagating group of defectives. This thesis is fundamentally unsound, and as such, cannot support legislative determinations or findings of a compelling state interest.

*Environmental*—Although the compulsory sterilization statutes originated under eugenic concepts, a more recent justification for involuntary sterilization is premised upon the alleged unfitness of the developmentally disabled person for parenthood.<sup>86</sup> The claim

81. Bligh, *supra* note 5, at 1060 (quoting KANSAS, GOVERNOR'S COMMISSION ON PROVISION FOR THE FEEBLE-MINDED, REPORT ON THE KALLIKAKS OF KANSAS 6-14 (1919)). The superintendent of the Florida Farm Colony for Epileptic and Feeble-Minded reported to the governor in 1922: "The feeble-minded girl who is allowed to grow up with a lack of restraint and supervision will almost surely become immoral." SECOND BIENNIAL REPORT OF THE SUPERINTENDENT OF THE FLORIDA FARM COLONY FOR EPILEPTIC AND FEEBLE-MINDED 16 (1922).

82. Ferster, *supra* note 16, at 602 (quoting COMMITTEE OF AMERICAN NEUROLOGICAL ASSOCIATION, EUGENICAL STERILIZATION 57 (1936). *Accord*, LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 46-47, discussing chart (CONLEY, THE ECONOMICS OF MENTAL RETARDATION 1973) which disputes the claim that the mentally retarded reproduce at a higher rate. *Contra*, SLOVENKO, SEXUAL BEHAVIOR AND THE LAW 101-02 (1965).

83. Roos, *supra* note 3, at 64.

84. Perske, *About Sexual Development: An Attempt to be Human With the Mentally Retarded*, 11 MENTAL RETARDATION 6-7 (1973), quoted in Howley, *supra* note 5, at 24.

85. HOWLEY, *supra* note 5, at 25.

86. A state may substitute new justifications for statutes enacted on the basis of outdated assumptions. *Doe v. Bolton*, 410 U.S. 179, 190-91 (1973).

that developmentally disabled persons do not make good parents and, thus, cannot provide a good environment for the upbringing of any children, has become quite prevalent in social and judicial thought.

Though it does not necessarily follow that the children of defective parents will themselves be defective, they are liable to be exposed to the miseries and hardships of being brought up by a mother or father incapable of self-control who will almost certainly neglect them, and who may, by reason of mental instability and ungovernable temper, aggravate by cruelty the results of ignorance and neglect.<sup>87</sup>

As with the eugenics theory, the assumptions underlying the parental fitness theory of non-consensual sterilization are subject to attack. "State laws which single out the mentally retarded as being specially unsuited for parenthood are often derived more from community fear and prejudice than from any sensible conviction regarding the particular incapacities of the retarded as a group."<sup>88</sup>

The correlation between developmental disability and parental unfitness is far from clear. Empirical studies have shown that persons who are mildly or moderately retarded (a classification which accounts for ninety percent of all retarded persons),<sup>89</sup> are capable of fulfilling parental responsibilities. Developmental disability does not preclude the capacity for warmth and affection, characteristics which are perhaps more determinative of good parenting than intelligence.<sup>90</sup> Dr. Leo Kanner observes:

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87. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 85 (1957). For support of the environmental theory, see Pitts, *Sexual Sterilization: A New Rationale?* 26 *ARK. L. REV.* 353 (1972).

88. Price and Burt, *Sterilization, State Action, and the Concept of Consent*, 1 *LAW & PSYCH. REV.* 57, 63 (1975).

89. Murdock, *supra* note 61, at 933 and 934 n.89 (citing NATIONAL ASSOCIATION FOR RETARDED CHILDREN, *FACTS ON MENTAL RETARDATION* 4 (1971)). Heber estimates that the percentage of educable developmentally disabled persons is seventy to eighty percent of the total developmentally disabled population. LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 14 (quoting HEBER, *EPIDEMIOLOGY OF MENTAL RETARDATION* (1970)).

90. A program which uses intelligence as a basis for determining parental fitness must take into account the imprecision of the testing process, as well as the possibility of cultural bias in the testing procedure. Murdock, *supra* note 61, at 928-29. See generally WOODY, *LEGAL ASPECTS OF MENTAL RETARDATION: A SEARCH FOR RELIABILITY* (1974) for a discussion of the unreliability of the classification system. See also Chez, *Mental Disability as a Basis for Contraception and Sterilization*, 18 *SOCIAL BIOLOGY* 5120-26 (Supplement) (1971), for the view that I.Q. should not be a criterion for parenting.

In my 20 years of psychiatric work with thousands of children and their parents, I have seen percentually at least as many 'in-telligent' adults unfit to rear their offspring as I have seen such 'feeble-minded' adults. I have—and many others have—come to the conclusion that, to a large extent independent of the I.Q., fitness for parenthood is determined by emotional involvements and relationships.<sup>91</sup>

Non-consensual sterilization of developmentally disabled persons based on a presumption of parental unfitness may be constitutionally defective for over-inclusiveness,<sup>92</sup> because not all persons in the group, not even a substantial minority, are parentally unfit. In addition, as was the case with the eugenic justification, statutes based upon an environmental theory may be under-inclusive<sup>93</sup> as well, for parental unfitness is by no means limited to the developmentally disabled.

*Therapeutic*—A third justification for compulsory sterilization is that the procedure and its effects are therapeutic for the patient, that "sterilization is to the advantage of the person sterilized, and, at least in the case of females, is actually welcomed."<sup>94</sup>

At the outset, one must make a distinction between what may be termed legitimate therapeutics and those reasons which fail to reach a level of legitimacy. Sterilization as a therapeutic measure may be legitimately necessary in three instances in order to protect the physical health of the patient: (1) diseases which make pregnancy dangerous for the mother; (2) diseases which make it probable that a pregnancy will result in a still-born; and (3) cases of frequent pregnancies which increase the probability of complications with subsequent births.<sup>95</sup> These can be properly viewed as instances where the state is acting *for* the retarded patient.<sup>96</sup>

91. Bligh, *supra* note 5, at 1062 (quoting KANNER, A MINIATURE TEXTBOOK OF FEEBLE-MINDEDNESS, 4-5 (1949)).

92. Murdock, *supra* note 61, at 931-32.

93. *Id.*

94. WILLIAMS, *supra* note 87, at 86.

95. LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 31.

96. The state may act under its *parens patriae* power solely in the best interest of the individual concerned. Two theories have developed as to how the *parens patriae* power should be exercised. Under the "best interest" theory, the court balances the personal benefits and detriments to the developmentally disabled individual in arriving at its decision. Under the "substitute judgment" doctrine, the court acts as it perceives the disabled person would act if competent to decide. See generally Gauvey and Shuger, *The Permissibility of Involuntary Sterilization Under the Parens Patriae and Police Power Authority of the State: In re Sterilization of Moore*, 6 Md. L.F. 109, 112-16 (1976). Under either theory, the decision to sterilize in these three situations would be warranted.

Along with these legitimate therapeutic justifications, however, are less valid reasons for sterilization "for the benefit of the patient," where the state, under the guise of a therapeutic motivation,<sup>97</sup> is doing unwelcomed things to the patient.

Sterilization makes such beings more tractable, like the gelding of the ox or the horse, that they become more amenable to treatment, and that, therefore, far from being an injury, the slight and nearly painless operation required improves physical vigor and makes the patient contented and happy.<sup>98</sup>

Two authorities in 1931 advocated compulsory sterilization of two groups of developmentally disabled persons for two distinct reasons: the "high-grade retardate" for the prevention of mental deficiency, and the "low-grade imbecile" for the discouragement of "obscene habits."<sup>99</sup> For this second group of individuals, the authorities claimed sterilization successfully stifled "disgustingly obscene" masturbatory habits, and alleviated habits which were "worse during menstrual cycle."<sup>100</sup>

It is sometimes asserted that the patient is rewarded by eugenic sterilization because it allows more handicapped persons to leave segregated institutional life, freeing up more of the state's resources which can then be spent on the individual patient's welfare.<sup>101</sup>

Implicit in the therapeutic justifications of the past is the misperception that developmentally disabled persons do not mind sterilization, but "accept sterilization blandly."<sup>102</sup> As Justice Holmes in *Buck v. Bell* stated, sterilization is "often not felt to be [a sacrifice] . . . by those concerned."<sup>103</sup> The fallacy of this view is

97. KITTRIE, *supra* note 27, at 334.

98. KENYON, *supra* note 12, at 467.

99. E.A. Whitney and M.M. Schick, *Some Results of Selective Sterilization* in ROSEN, *supra* note 5, at 202-10.

100. *Id.* at 206.

101. Gray, *Compulsory Sterilization in a Free Society: Choices and Dilemmas*, 41 CIN. L. REV. 529, 585 (1972). In advocating compulsory sterilization, the superintendent of the Florida Farm Colony for Epileptic and Mentally Deficient Children rationalized:

It would seem that many of our patients could then be cared for on the outside, whereas, at the present time, we cannot afford to release them. Considerable expense in their care would be thus avoided and they would be able to enjoy living in greater freedom than when confined to an institution.

TENTH BIENNIAL REPORT OF FLORIDA FARM COLONY FOR EPILEPTIC AND MENTALLY DEFICIENT CHILDREN 12 (1939).

102. Roos, *supra* note 3, at 50.

103. 274 U.S. at 207.



revealed by several psychological studies, including that by Sabagh and Edgerton,<sup>104</sup> the first study in which sterilized patients were asked to express their feelings. Among the typical responses were these:

I'd like to have one or two kids but not a whole lot. I take care of everybody else's kids and everybody tells me I'm good with children and they ask me why I don't have one of my own and I just say that I can't have one.<sup>105</sup>

Gee, I sure would like to have a baby. . . . They never told me that they were going to do that surgery to me. They said they were going to remove my appendix and then they did that other. They should have explained to me. . . . After they did that surgery to me, I cried. . . . I still don't know why they did that surgery to me. The sterilization wasn't for punishment, was it? Was it because there was something wrong with my mind?<sup>106</sup>

Although such responses may not be used as empirical evidence of competence and parental fitness, they tend to refute the myth of patient acceptance of or indifference toward forced sterilization.

Researchers have found that involuntarily sterilized persons tend to perceive sterilization as a symbol of reduced or degraded status,<sup>107</sup> of punishment synonymous in their minds with castration,<sup>108</sup> and of self as deviant and unworthy of parental rights.<sup>109</sup>

*Fiscal*—With increasing frequency, economic considerations play a role in the struggle to legitimize a non-consensual sterilization scheme. The economic justification for sterilization can be summarized as follows:

As our society becomes more technologically sophisticated and demands more and more freedom from discomfort, the production of each individual and the benefit-to-cost ratio of each expenditure becomes increasingly important. On this scale, the mentally [handicapped] are in direct competition for personnel and funds with [other] programs.<sup>110</sup>

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104. The study included forty patients who had been sterilized at Pacific State Hospital, Pomona, California between 1931 and 1951. Sabagh and Edgerton, *Sterilized Mental Defectives Look at Eugenic Sterilization*, 9 *EUGENICS* Q. 215-16 (1962) (cited in Bligh, *supra* note 5, at 1062-63).

105. *Id.*

106. *Id.*

107. LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 50-51.

108. Roos, *supra* note 3, at 48.

109. LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 49.

110. *Id.* at 29-30 (quoting Cooke, "Ethics and Law on Behalf of the Mentally Re-

The proponents of this view conclude that since developmentally disabled persons place a financial burden on the state greater than the benefit they return, the state is justified in establishing policies such as sterilization to reduce the financial burden they impose.<sup>111</sup> Embodied in this justification is the feeling that "three generations of welfare recipients is enough."<sup>112</sup>

Although this justification for sterilization is immune from analysis in terms of unscientific or unwarranted assumptions, it is easy to perceive that this theory, too, stems from society's prejudicial view of mentally handicapped persons as a "sub-human" or "other-human" group. "The intolerance already exhibited by some people to handicaps is expressed in a variety of ways, including the view that having children is an indulgence which the public should not have to finance."<sup>113</sup>

On one level, then, proponents of a fiscal theory of sterilization stress the financial strain on the state which results from the disabled individual's bearing and raising offspring and, thus, advocate sterilization as a means of eliminating this financial burden. Perhaps underlying this theory, however, is the more extreme economic view that sterilization should be used as a means of eliminating not only the financial burden associated with offspring who may become dependents of the state, but of eventually eliminating the entire group of financially burdensome individuals.

Abnormal individuals are not only valueless but are generally harmful to society; for, beside being nonproducers, they absorb the energies and the productive power of others. Hence, in the development of a people it becomes necessary that the lifetime of these abnormal individuals should be shortened. . . .

[I]t is difficult to see why our moralists, our ethicists and our economists do not unite in insisting upon a plan of treatment of all the degenerates who come within the cognizance of our legal and medical authorities, that shall conserve the best and highest interests of society and at the same time co-operate with nature in a speedy, effective, and painless removal of that class of individuals which public morality, Christian ethics, economics, and

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tarded." 20(1) PEDIATRIC CLINICS OF NORTH AMERICA 260 (Feb. 1973).

111. *Id.*

112. KITTRIE, *supra* note 27, at 332. It is interesting to note that, historically, the number of non-consensual sterilizations performed has tracked national economic conditions. The sterilization rate tends to increase during periods of economic downturns. *Id.*

113. LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 61.

nature as well, have marked as unfit to survive.<sup>114</sup>

Conflicting legal authority exists as to whether the state may properly take into account its financial interests when justifying an interference with a fundamental individual right.<sup>115</sup> Apart from this question of positive law, however, is an equally or more important question of political ideology and societal values: Are we as a self-governing, liberal society to structure the allocation of rights and to frame issues of social justice on the basis of a cost-benefit scheme?<sup>116</sup> We must be willing to address this and similar questions, for an economic theory of sterilization is likely to gain added support as other eugenic and environmental theories are thrown into disrepute.<sup>117</sup>

### *b. Least Restrictive Alternative Analysis*

When governmental action authorized by legislation infringes upon a fundamental individual right, the action must not only be necessary to achieve a compelling state interest, but must also be the least drastic means of effectuating that interest; a statute cannot withstand constitutional scrutiny if less drastic alternatives to the state action are available but not utilized.<sup>118</sup> The United States Supreme Court has noted:

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>119</sup>

When this principle is applied to the justifications for non-consensual sterilization, it becomes evident that the statutes are unconstitutional on this basis alone.

We have already discussed less drastic alternatives to steriliza-

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114. K. Schwartz, *supra* note 2, at 150, 162-63.

115. See *Romeo v. Youngberg*, 644 F.2d 147, 161 (3d Cir. 1980). But see *In re Sterilization of Moore*, 221 S.E.2d 307, 312 (N.C. 1976).

116. See generally, B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

117. See, e.g., *In re Sterilization of Moore*, 221 S.E.2d 307, 312 (N.C. 1976).

118. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Romeo v. Youngberg*, 644 F.2d 147, 161 (3d Cir. 1980).

119. *Shelton v. Tucker*, 364 U.S. at 488.

tion available when a eugenic interest is controlling.<sup>120</sup> Genetic counseling, education in the use of contraceptives, and utilization of genetic testing devices are alternatives which must be explored before sterilization is performed. And with developmental disability which has as its basis purely environmental or both environmental and genetic factors, a close monitoring and/or alleviation of those factors may be sufficient.

Where sterilization is premised on a parental fitness theory, the availability of supportive services to help deal with a wanted or unwanted birth and the difficulties of parenting is a less drastic alternative which must be explored.

Sterilization which is undertaken in part to ease the financial burden of the state is subject to a more fundamental attack: "[Sterilization is] especially repugnant in America's present state of affluence. No such drastic curtailment of one's procreative power is justified . . . until 'all reasonable attempts at improving the environment and rehabilitation of the disabled' have failed or until 'food and air shortages . . . become so severe that there might not be enough to bear the burden of any further growth in population.'"<sup>121</sup>

## 2. "Natural" Right Theory

*"A law as vital as this cannot be nullified by a simple appeal to the emotions, nor by a sentimental cry about the helplessness of degenerates. The real answer to sterilization adherents will not be found in drooling speeches of social workers; it will be found at the base of the American system, in the eternal principles of good government."*<sup>122</sup>

Proponents of a second legal theory concerning the constitutionality of compulsory sterilization statutes address axiologically the nature of the right and the intrusion involved in sterilization, and conclude that regardless of the scientific validity of its underlying precepts, the need for compulsory sterilization can never amount to a compelling state interest for which such an intrusion would be justified. These proponents use as their starting place Justice

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120. See text accompanying notes 67-70 *supra*.

121. KITTRIE, *supra* note 27, at 328-29.

122. Ruddy, *Compulsory Sterilization: An Unwarranted Extension of the Powers of Government*, 3 NOTRE DAME L. REV. 1, 10 (1927).

Holmes' logic, or illogic, in *Buck v. Bell*.<sup>123</sup> Many feel that the decision "is the product of a juristic philosophy in complete discord with that on which our principles of law and government are founded. Although the case is [fifty-five] years old it might really be considered a recent case in view of the age of the tradition of liberty which it abruptly scrapped."<sup>124</sup>

#### a. Vaccination Analogy

*"The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."*<sup>125</sup>

Followers of a deductive, natural law tradition think not. The medical procedures involved in the respective medical exercises of state power are drastically dissimilar.<sup>126</sup> Vaccination involves a much less intrusive invasion of one's rights than does sterilization.<sup>127</sup> In addition, the effectiveness of vaccination to accomplish its stated purpose without danger to the individual had been demonstrated by careful analysis and experimentation.<sup>128</sup>

When the constitutionality of the Massachusetts compulsory vaccination statute was upheld by the state supreme court in 1903<sup>129</sup> and affirmed by the United States Supreme Court in 1905<sup>130</sup> as being a valid exercise of the state's police power, the Massachusetts Supreme Court said:

If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, it is not in their power to vaccinate him by force, and the worst that could happen to him under the statute would be the payment of the penalty of five dollars.<sup>131</sup>

Justice Holmes failed to apply the vaccination analogy correctly to compulsory sterilization, for with compulsory sterilization, a non-

123. 274 U.S. 200 (1927). See text accompanying notes 19-22 *supra*.

124. Gest, *Eugenic Sterilization: Justice Holmes vs. Natural Law*, 23 TEMPLE L.Q. 306 (1949-50).

125. *Buck v. Bell*, 274 U.S. at 207.

126. Burgdorf, *supra* note 20, at 1009.

127. *Id.*

128. *Id.* See also O'Hara and Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 30 n.68 (1956) (quoting MONTAVON, *EUGENIC STERILIZATION IN THE LAWS OF THE STATES* 24 (1930)).

129. *Commonwealth v. Pear*, 66 N.E. 719 (Mass. 1903), *aff'd*, 197 U.S. 11 (1905).

130. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

131. *Commonwealth v. Pear*, 66 N.E. at 722.

consenting individual does not have the luxury of choosing to pay a monetary fine.

*b. War Analogy*

*"We have seen more than once that the public welfare may call upon the best citizens for their lives."*<sup>132</sup>

Once again Justice Holmes uses analogy to support the Court's holding that compulsory sterilization is within the state's police power. But as with the vaccination analogy, this wartime analogy proves faulty. Wartime service may be justifiable in situations of necessity and urgency to insure the physical safety of citizens,<sup>133</sup> but such necessity is lacking in the case of sterilization.

*c. Harmful Logic*

*"The difference between the evil wrought by a polite merchant and that by an uncouth robber is one of manners only. Both types of men are inimical to society; should not both therefore be sterilized?"*<sup>134</sup>

Adherents to the legal view that compulsory sterilization could never be justified as achieving a compelling state interest express concern over the logical extension of the rationale underlying sterilization. The rationale could lead to a "systematic elimination of imperfect . . . specimens of humanity,"<sup>135</sup> action in line with the philosophy of the absolute state.<sup>136</sup>

The danger of the rationale or logic underlying forced sterilization can take one of two forms. There is the dangerous possibility of a non-consensual sterilization program being extended to include other societal groups which, like the developmentally disabled, are the recipients of misperceptions and prejudice. Justice Douglas, writing for the Court in *Skinner v. Oklahoma*,<sup>137</sup> recognized the danger:

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132. *Buck v. Bell*, 274 U.S. at 207.

133. *Burgdorf*, *supra* note 20, at 1008. *See also* O'Hara and Sanks, *supra* note 129, at 29-30.

134. *Ruddy*, *supra* note 122, at 3.

135. *Id.* at 8.

136. *Gest*, *supra* note 124, at 309.

137. 316 U.S. 535 (1942).

The power to sterilize . . . may have subtle, far-reaching and devastating effects. In evil and reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.<sup>138</sup>

The New Jersey Supreme Court echoed the fear in *Smith v. Board of Examiners of Feeble-Minded*,<sup>139</sup> where the court held New Jersey's sterilization statute violative of equal protection of the laws:

[T]he decision . . . carries with it certain logical consequences, having far-reaching results. For the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the Legislature, be a distinct benefit to society. If the enforced sterility of this class be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open to which it would be difficult to assign a legal limit.<sup>140</sup>

The fear expressed in these decisions and by other legal authorities is not without basis. In 1922, eugenicists published a Model Eugenic Sterilization Law which advocated the forced sterilization of such groups as "orphans, ne'er-do-wells, the homeless, tramps and paupers."<sup>141</sup> Likewise, in 1929, C. E. Ballew introduced in the 55th General Assembly of Missouri Legislators a bill for sterilization of those "convicted of murder (not in the heat of passion), rape, highway robbery, chicken stealing, bombing, or theft of

138. *Id.* at 541.

139. 88 A. 963 (N.J. 1913).

140. *Id.* at 966.

141. The Model Eugenic Sterilization Law advocated sterilization of the

- 1) Feeble-minded
- 2) Insane (including the psychopathic)
- 3) Criminalistic (including the delinquent and wayward)
- 4) Epileptic
- 5) Inebriate (including drug-habitues)
- 6) Diseased (including the tuberculous, the syphilitics, the leprous, and others with chronic infectious and legally segregable diseases)
- 7) Blind (including those with seriously impaired vision)
- 8) Deaf (including those with seriously impaired hearing)
- 9) Deformed (including the crippled) and
- 10) Dependent (including orphans, ne'er-do-wells, the homeless, tramps, and paupers.)

Ferster, *supra* note 16, at 618 (quoting LAUGHLIN, *EUGENICAL STERILIZATION IN THE UNITED STATES* 446-47 (1922)).

automobiles.”<sup>142</sup> And one need not look far for another tragic example of the reality of this fear: Nazi Germany in the 1930’s.

In his famous *Carolene Products*<sup>143</sup> footnote, Justice Stone indicated that the Court can give extraordinary constitutional protection not only to those interests expressed in the Constitution, but also to those interests which are unlikely to receive adequate consideration in the political process, specifically the interests of “discrete and insular minorities” unable to form political alliances.<sup>144</sup> Such protection is certainly warranted in the compulsory sterilization context.

Another danger lies, not in the extension of sterilization to other groups, but in the possibility of racial discrimination in the application of a sterilization program. In a study of the operation of the Eugenics Board of Alberta, Canada, the researcher<sup>145</sup> found a disproportionately small number of persons of British and West European descent presented to or approved by the Board for sterilization. In addition, a disproportionately small number of British citizens were actually sterilized. The reverse situation, however, was discovered for persons of East European and Indian or Metis ethnicity. Although citizens of such descent accounted for only 15.4 % of the Alberta population, they constituted 29.7 % of the number of patients presented to and approved by the Board for sterilization, and 35.1 % of those actually sterilized. The researcher postulates that the discriminatory practices mirrored the current public attitude which, as shown by the immigration policies after World War I, reflected an anti-East European bias.<sup>146</sup> He sums up his findings:

Persons presented to and approved for sterilization by the Board occupied socially vulnerable positions. They tended to be female rather than male, young and inexperienced rather than mature, not employed and dependent rather than self-supporting, employed in the low status rather than prestigious jobs, residents of small towns rather than cities, members of ethnic minorities rather than the dominant ethnic group, single rather than mar-

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142. Bligh, *supra* note 5, at 1063.

143. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n.4 (1938).

144. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933 (1973).

145. Christian, “The Mentally Ill and Human Rights in Alberta: A Study of the Alberta Sexual Sterilization Act,” 1974. Unpublished paper (cited in LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 42-45).

146. *Id.* at 44-45.



ried, and had been defined as sexual deviants.<sup>147</sup>

Although this author has not uncovered similarly extensive studies in the United States, the Canadian study highlights the socio-political consequences which may potentially result from any program of compulsory sterilization.

### III. CONSENSUAL STERILIZATION UNDER STATUTORY AUTHORITY

In the preceding sections, this comment has argued that sterilization performed pursuant to compulsory or non-consensual sterilization legislation is a gross invasion of the developmentally disabled individual's constitutionally protected privacy right, unsupported by any compelling state interest. Many authorities to date have strongly advocated the repeal of these compulsory statutes.<sup>148</sup> But just as the decision by a developmentally disabled citizen to have children should be protected, so, too, should his/her right not to have children be protected.<sup>149</sup> The option of sterilization should be as equally available to the competently consenting developmentally disabled individual as it is to other individuals. Sterilization must also be made available to those individuals incapable of consent who need sterilization for therapeutic reasons, as well as to those individuals whose retardation makes the birthing and parenting of children objectively impossible.

Once we discard compulsory sterilization as a constitutionally-infirm scheme, at least two alternatives remain: sterilization performed with consent under a consensual sterilization statute, and sterilization performed with consent under judicial authority. This section of this comment will examine these alternatives.

[J]ust as society has been plagued by its fear of procreation by the mentally retarded . . . , so also has society harbored a fear of empowering the state to engage in a program of eugenics. . . . States may merely substitute techniques more palatable than compulsory sterilization to achieve much the same result.<sup>150</sup>

Two problems which are inherent in a consensual sterilization

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147. *Id.* at 45.

148. Many groups advocate complete repeal, including the American Civil Liberties Union Board of Directors and the American Bar Foundation on the Rights of the Mentally Ill. BRAKEL, *supra* note 17, at 209.

149. *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

150. Price and Burt, *supra* note 88, at 66.

scheme must be understood and overcome in order that consensual sterilization not become a "more palatable" but equally dangerous form of compulsory sterilization. First, the concept and reality of consent, both by the developmentally disabled individual and by a sufficient third party, must be analyzed to insure that to the greatest extent possible, sterilization is performed on the basis of the patient's true desire, not on the basis of institutional or parental convenience. Second, the traditional view that consensual sacrifices of liberty are subject to less constitutional protection than are sacrifices of liberty compelled by the state<sup>151</sup> must be abandoned in the sterilization context in order to protect the developmentally disabled individual.

### A. *Analysis of Present Statutes*

Presently, nine states have consensual sterilization statutes.<sup>152</sup> As non-consensual sterilization continues to lose support, the number of consensual statutes may continue to increase.

#### 1. *Procedure*

Of the nine consensual sterilization statutes, only the Colorado statute requires the consent of the patient before the sterilization can be performed.<sup>153</sup> In all others, third-party consent is sufficient. In Oregon, failure to request a rehearing is deemed to be consent.<sup>154</sup>

The requirements vary as to who may initiate the sterilization proceedings. The patient, parent or relative, physician (Connecticut, Maine, Oregon, Vermont, Virginia), Commissioner of Public Welfare (Minnesota), or an interested party (Connecticut, Oregon) may petition for sterilization. Seven of the statutes provide for a hearing (Colorado, Connecticut, Georgia, Minnesota, New Jersey, Oregon, Virginia), at which hearing only three statutes provide

151. Burns, *Wyatt v. Aderholt: Constitutional Standards for Statutory and Consensual Sterilization in State Mental Institutions*, 1 LAW & PSYCH. REV. 79, 86 (1975).

152. COLO. REV. STAT., §§ 27-10.5-128—27-10.5-132 (1980 Supp.); CONN. GEN. STAT. ANN. § 45-78p—z (1981 Supp.); GA. CODE ANN. § 84-931—936 (1979); ME. REV. STAT. ANN. tit. 34, §§ 2461—2468 (1978); MINN. STAT. ANN. §§ 256.07—.09 (1971), 252A.13 (1981 Supp.); N.J. STAT. ANN. § 30.4-24.2 (1981). ORE. REV. STAT. § 436.010—.150 (1979); VA. CODE § 54.325.9—.15 (1981). VT. STAT. ANN. §§ 18-8701—8704 (1968).

153. COLO. REV. STAT. § 27-10.5-128 (1980 Supp.). The Connecticut statute provides that if the patient cannot give competent consent, no such sterilization shall be performed until a court determination of consent or upon a showing that the operation is in the best interest of the person. CONN. GEN. STAT. ANN. § 45-78q (1981 Supp.).

154. ORE. REV. STAT. § 436.110 (1979).

that the patient must be present and may present and cross-examine witnesses on his/her own behalf (Colorado, Connecticut, New Jersey).

## 2. *Justification for Sterilization*

Of the five consensual sterilization statutes which expressly state the theory upon which they are based, three are eugenic in purpose (Maine, Oregon, Vermont), and two are based on an environmental justification (Georgia, Oregon).

## 3. *Standards and Burdens of Proof*

As was the case with non-consensual sterilization statutes, the standards which must be met before sterilization can be ordered vary greatly. The consensual portion of Maine's statute requires a finding that sterilization will prevent the "reproduction of further feeble-mindedness."<sup>155</sup> The Vermont statute delineates more standards which must be met:

1. patient is likely to procreate defective offspring unless sterilized;
2. health of patient will not be injured by the operation; and
3. the welfare of the person and the public will be improved by the operation.<sup>156</sup>

Four statutes explicate the applicable burden of proof and on whom the burden falls. Connecticut and Virginia require the petitioner to prove by clear and convincing evidence the necessity of sterilization.<sup>157</sup> In Georgia, a legal preponderance of evidence standard is used.<sup>158</sup> The Oregon statute shifts the burden entirely to the patient to show cause why an order of sterilization should not be entered.<sup>159</sup>

## B. *Prerequisites for Valid Patient Consent*

When sterilization is performed pursuant to the patient's own

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155. ME. REV. STAT. ANN. tit. 34, § 2461 (1978).

156. VT. STAT. ANN. tit. 18 § 8702 (1968).

157. CONN. GEN. STAT. ANN. § 45-78y (West 1981 Supp.); VA. CODE § 54-325.12 (1981).

158. GA. CODE ANN. § 84-933(b)(iv) (1979). A "clear, strong and convincing" burden of proof may be constitutionally required. See *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451, 457 (M.D.N.C. 1976); *In re Guardianship of Hayes*, 608 P.2d 635, 641 (Wash. 1980).

159. ORE. REV. STAT. § 436.041 (1979).

consent, that consent must be examined to insure that it reflects the true desire of the developmentally disabled individual. In order for the consent of a developmentally disabled individual to be taken as valid and controlling, three elements should exist. The consent must be given: (1) voluntarily, (2) after full disclosure of all relevant considerations, and (3) by a person competent to make such a decision.<sup>160</sup>

The voluntariness requirement assumes an exercise of free will and the absence of any coercive or influential measures. "[T]he word voluntary is frequently a mere subterfuge, in that it is often a condition of discharge from the institution that the patient be sterilized, and consequently the individual involved is in the position of being confined or confinable until he gives his consent for sterilization, which hardly makes the bargain free and equal and nullifies the real meaning of the word voluntary."<sup>161</sup> "[T]he coercive feature is hardly masked by the fictive option of sterilization or life imprisonment."<sup>162</sup> Sterilization which is made a ticket to noninstitutionalized life or a precondition to welfare payments<sup>163</sup> cannot be classified as truly voluntary.

Valid consent is informed. It is based upon knowledge and information received concerning all pertinent factors: purpose and nature of the operation, irreversibility of effect, other potential medical and emotional consequences, available options, etc. A complete explanation of these factors should be given by an objective third-party.

A voluntary and informed consent can only be rendered by one competent to make a decision concerning sterilization. Competency presupposes an ability to comprehend the nature and conse-

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160. LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 75. See also Comment, *Sterilization of Mental Defectives: Compulsion and Consent*, 27 BAYLOR L. REV. 174, 187-90 (1975).

161. Ferster, *supra* note 16, at 621 (quoting COMMITTEE OF THE AMERICAN NEUROLOGICAL ASSOCIATION, EUGENICAL STERILIZATION 7-8 (1935)).

162. *State v. Cavitt*, 157 N.W.2d 171, 179 (Neb. 1968) (Smith, J., dissenting).

163. Some state legislatures have attempted to make sterilization a prerequisite to welfare payments to mothers of illegitimate children. KITTRE, *supra* note 27, at 332. See *In re Andrada*, 33 U.S.L.W. 3278, cert. denied, 380 U.S. 953 (1965) and *People v. Tapia*, No. 73313 (Santa Barbara Super. Ct., July 7, 1965), cases in which persons on welfare who were convicted of crimes were offered lower sentences or probation in return for submission to sterilization. But see 42 U.S.C. § 300a-8 (1975), prohibiting any employee of a state which administers any program supplemented by federal financial assistance from coercing or endeavoring to coerce "any person to undergo . . . sterilization . . . by threatening such person with the loss of, or disqualification for the receipt of, any benefit or service under a program receiving Federal financial assistance."

quences of sterilization, as well as an ability to give or withhold consent after personal calculation and deliberation. Developmental disability is not co-extensive with a lack of competency to make such a decision.<sup>164</sup> One authority suggests that the state will rarely confront a situation in which the retarded individual should be sterilized but lacks the capacity to consent.<sup>165</sup> Care should be exercised to insure that those who are capable of making the decision concerning sterilization do so.

### C. Inadequacy of Third-Party Consent

Because all but one of the consensual sterilization statutes allow for the substituted consent of a parent, relative, or guardian, it is necessary to examine and understand the inadequacies of third-party consent in order to learn how best to overcome the deficiencies.

Traditionally, parental consent has been sufficient to authorize medical care for a minor child when medical assistance is necessary to further the child's best interests,<sup>166</sup> subject to limited interference by the state acting in its *parens patriae* capacity to protect those who are unable to protect themselves.<sup>167</sup> The traditional basis for parental control over medical treatment of a minor child may be insufficient in the sterilization context, for more often than not, sterilization of a developmentally disabled child is not medically necessary to insure or maintain the health of the child.

The parent of a developmentally disabled child may believe he or she is consenting to the non-therapeutic sterilization procedure in one of two capacities or for one of two reasons.<sup>168</sup> First, most parents would believe that their consent is in the best physical and emotional interests of their child. Conflicts of interests, however, are inherent in such a situation.<sup>169</sup> The fear of being burdened with the responsibilities of a new child, as well as the apprehension which may accompany the sexual development of a developmen-

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164. Murdock, *supra* note 61, at 933.

165. *Id.* at 934. Murdock suggests that with those few individuals who cannot competently consent, many are incapable of reproduction or remain in protected environments, making sterilization unnecessary.

166. See 74 A.L.R.3d 1224. See generally R. MNOOKIN, *supra* note 66 at 341-446 (1978).

167. *In re Grady*, 426 A.2d 467, 479-81 (N.J. 1981). See generally Gauvey and Shuger, *supra* note 96.

168. See note 96 *supra*.

169. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978); Mnookin, *supra* note 66, at 362-63. *Contra* *Parham v. J.R.*, 442 U.S. 584 (1979).

tally disabled child, while both legitimate emotions and concerns, contribute to the reality that the "benefit" resulting from sterilization may accrue more to the parent than to the child.<sup>170</sup> Second, the parent may consent to fulfill a presumption of the minor's own wishes. While substituted parental consent may be legally and morally appropriate in circumstances with less potentially harmful results, parental consent in this non-therapeutic sterilization context is less legitimate, for it may not be easily presumed that the child, upon reaching majority, would choose sexual sterilization for him/herself.<sup>171</sup>

Traditionally, the law does not give the parent any inherent control over the person or property of a child of majority age.<sup>172</sup> In situations where the major child is incompetent, a court-appointed guardian can make decisions on the ward's behalf concerning personal and financial affairs. But the considerations surrounding parental consent to the sterilization of a minor child are relevant here as well. Should the guardian be allowed to consent to a deprivation of the ward's fundamental rights when sterilization is not dictated by a legitimate therapeutic need?

#### D. *Paradigm: The Connecticut Statute*

While recognizing that the use of unfettered third-party consent must be carefully controlled, it is necessary to insure that those developmentally disabled persons who cannot give competent consent but who truly desire or need sterilization be given the freedom to exercise that choice. Connecticut has sought to balance these concerns in its consensual sterilization procedure. Connecticut's is by far the most creative and protective of all the consensual sterilization statutes. For that reason, it deserves examination in detail.

The requirements of the Connecticut statute are as follows:

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170. See *North Carolina Ass'n for Retarded Children v. State*, 420 F. Supp. 451, 456 (M.D.N.C. 1976) ("We think such confidence in *all* next of kin and *all* legal guardians is misplaced, and that the unstated premises of competency to decide to force initiation of the proceeding and never failing fidelity to the interest of the retarded person are invalid.") *But see, In re Sterilization of Moore*, 221 S.E.2d 307, 316 (N.C. 1976) ("[Patient's] mother unquestionably is in a position to know what is best for the future of her child.") See Howley, *supra* note 5, at 30-37, for a discussion of the attitudes of parents of developmentally disabled children toward their children's sexual development, sexual expression, marriage, and sterilization.

171. McCormick, *Proxy Consent in the Experimentation Situation*, in MNOOKIN, *supra* note 66, at 429-31.

172. *Holmes v. Powers*, 439 S.W.2d 579 (Ky. 1968). See Soskin, *Voluntary Sterilization—Safeguarding Freedom of Choice*, 2 AMICUS 40, 43 (1977).

1. No person shall be sterilized unless that person is 18 years or older and has given informed consent in writing to the sterilization.

2. If the person is institutionalized, or if any physician has reason to believe the person is unable to give informed consent, a probate court must hold a hearing to determine the person's competency to give consent. An application for such determination may be filed by the patient, the attending physician, institution director, or an interested party and shall state the reason for seeking such determination.

3. Upon receipt of the application, the court sets a time and place for the hearing. The hearing need not be in a courtroom if another location would facilitate the presence of the patient.

4. Notice must be served on: a) the patient, b) institution director if applicable; c) parents of patient, d) spouse, if applicable, e) siblings, if parents are deceased, f) the office of protection and advocacy, and g) such other persons as the court may determine have an interest in the patient.

5. The court shall appoint legal counsel to represent patient if patient has not already selected counsel.

6. At the hearing, sworn written reports from an interdisciplinary team of impartial panel members appointed by the court from a panel of physicians, psychologists, educators, social and residential workers who have personally observed or worked with the patient must be submitted.

7. The patient shall be present at the hearing. The patient or counsel may present evidence and cross-examine any witnesses.

8. If the court finds that the patient is unable to give informed consent, or that the patient is under guardianship, the court must determine whether sterilization is in the patient's best interest. The court must find all of these factors to be present: a) less drastic alternative contraceptive methods have proven unworkable or inapplicable, b) the individual is physiologically capable of procreation, c) the individual has the capability and a reasonable opportunity for sexual activity, and d) procreation would endanger the life or severely impair the health of the individual.

9. Even when the court finds the individual incompetent to give consent and sterilization to be in the individual's best interest, the individual can refuse sterilization, provided the court concludes that the individual understands the nature and consequences of such refusal.<sup>173</sup>

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173. CONN. GEN. STAT. ANN. § 45-78p—z (West 1981 Supp.).

The Connecticut statute is unique in two respects. First, no other consensual sterilization statute defines "best interest" in terms of medical necessity or the physical and mental health of the patient. This requirement insures against sterilization ordered on the basis of third-party interests alone. Second, no other statute allows the patient an opportunity to refuse sterilization once the court has made its determination. Even though the Connecticut statute could be more protective if it applied the hearing requirement to individuals under guardianship, it successfully reduces the role of the consenting third party and maximizes consideration and protection of the developmentally disabled patient.

#### IV. STERILIZATION WITHOUT STATUTORY AUTHORITY

In the past, courts have been extremely reluctant to order the sterilization of developmentally disabled persons in the absence of specific statutory authority.<sup>174</sup> Courts have rejected contentions that jurisdiction to order such procedures is impliedly conferred by general enactments which empower the courts to act on behalf of incompetent persons.<sup>175</sup> Recognizing that sterilization irreversibly denies to the developmentally disabled individual a fundamental right, courts have expressed "a preference that the difficult decisions regarding sterilization be made by a legislative body."<sup>176</sup>

Increasingly, however, courts have accepted the task of ruling on sterilization requests in the absence of controlling legislation. The federal district court in *Wyatt v. Aderholt*<sup>177</sup> by implication recognized the "inherent power of the . . . court 'to hear and determine all matters legal and equitable in all proceedings known to the common law' "<sup>178</sup> when it issued guidelines for a sterilization procedure after holding the Alabama statute unconstitutional. The United States Supreme Court in *Stump v. Sparkman*,<sup>179</sup> where a woman who had been nonconsensually sterilized as a child brought an action against the judge who issued the sterilization order, held

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174. *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971); *Hudson v. Hudson*, 373 So. 2d 310 (Ala. 1979); *A.L. v. G.R.H.*, 325 N.E.2d 501 (Ind. Ct. App. 1975), *cert. denied*, 425 U.S. 936 (1976); *In re Interest of M.K.R.*, 515 S.W.2d 467 (Mo. 1974); *In re Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *Frazier v. Levi*, 440 S.W.2d 393 (Tex. Civ. App. 1969). See Annot. 74 A.L.R.3d 1210.

175. 74 A.L.R.3d 1210, 1213.

176. *In re Guardianship of Hayes*, 608 P.2d at 637.

177. 368 F. Supp. 1383 (M.D. Ala. 1974).

178. *In re Guardianship of Hayes*, 608 P.2d at 638 (quoting *In re Hudson*, 126 P.2d 765, 777 (Wash. 1942)).

179. 435 U.S. 349 (1978).



that the judge was immune from suit because he "was a member of a court which had broad jurisdiction at law and in equity, and which was not prohibited from considering a petition for sterilization by either statute or controlling case law."<sup>180</sup> In addition, state courts in New York,<sup>181</sup> New Jersey,<sup>182</sup> Ohio,<sup>183</sup> Maryland,<sup>184</sup> Washington,<sup>185</sup> and Alaska<sup>186</sup> have explicitly recognized such inherent judicial power.

Courts that have reviewed sterilization requests on the basis of their inherent authority have generally required the petitioner to satisfy a much heavier standard of proof than have courts acting under statutory authority.<sup>187</sup> Before discussing why such might be the case, let us look at two exemplary decisions by courts acting pursuant to inherent judicial authority which explicate this heavy standard of proof: *Wyatt v. Aderholt*<sup>188</sup> and *In re Guardianship of Hayes*.<sup>189</sup> Although the courts take somewhat different approaches to the factfinding process, the *Wyatt* court utilizing the mechanism of committee review and the *Hayes* court acting as sole factfinder, both schemes highlight the paramount concern for and protection of the developmentally disabled individual.

The United States District Court in *Wyatt* recognized the fallacy of consensual sterilization when based on the consent of one other than the patient, and the danger involved when consent is made a trade-off for full constitutional protection. The court promulgated "adequate standards and procedural safeguards to insure that all future sterilization be performed only where the full panoply of constitutional protections has been accorded to the individuals involved,"<sup>190</sup> discarding the notion that only non-consensual action by the state required full constitutional protection.

The *Wyatt* guidelines provide that the written consent of the institutionalized resident, as certified by the facility director, must be (a) based upon an understanding of the nature and conse-

180. *Id.* at 358.

181. *In re Sallmaier*, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (Sup. Ct. 1976).

182. *In re Grady*, 426 A.2d 467 (N.J. 1981).

183. *In re Simpson*, 180 N.E.2d 206 (Ohio P. Ct. 1962).

184. *Ex parte Eaton*, Baltimore Cir. Ct. Nov. 11, 1954.

185. *In re Guardianship of Hayes*, 608 P.2d 635.

186. *In re C.D.M.*, 627 P.2d 607 (Alaska 1981).

187. Compare standards of consensual sterilization statutes, text *supra* accompanying notes 155 and 156 with standards delineated in *Hayes* and *Grady*, text accompanying notes 193-96 *supra*.

188. 368 F. Supp. 1383 (M.D. Ala. 1974).

189. 608 P.2d 635.

190. *Wyatt v. Aderholt*, 368 F. Supp. at 1384.

quences of sterilization, (b) given by a person competent to make such a decision, and (c) given voluntarily, free from any implied or expressed coercion. Next, the consent is reviewed by a committee consisting of five members from various professional and personal backgrounds.<sup>191</sup> The committee is to review medical, social, and psychological information concerning the resident and interview the resident as well as other concerned individuals to determine whether the resident has given his/her informed consent.

If the resident is legally incompetent, and/or if the facility director cannot certify that the resident understands the nature and consequences of sterilization, the review committee must then determine whether the resident has voluntarily formed a genuine desire to be sterilized. Only when the committee finds that such genuine desire exists and that sterilization is in the best interest of the resident can sterilization be approved. A determination of best interest must take into account possible alternative birth control methods, and "shall not be made on the basis of institutional convenience or purely administrative considerations."<sup>192</sup> The committee's decision that sterilization is in the best interest of the resident is then reviewed by a court of competent jurisdiction.

The *Wyatt* safeguards are designed to insure fully informed consent. When the resident is incapable of providing such consent, however, the *Wyatt* guidelines still allow for patient participation by requiring a determination of the patient's genuine desire, thereby maximizing the freedom of personal choice.

The Supreme Court of Washington recently decided a case in which the mother of a mentally retarded minor petitioned the court for an order appointing her as guardian of the minor and authorizing the minor's sterilization. In *In re Guardianship of Hayes*,<sup>193</sup> the court held that the mother had not shown by clear, cogent, and convincing evidence that the procedure was in the best interest of the minor. After elaborating upon the inherent power of the court to decide the issue, the supreme court provided standards to guide the lower courts when exercising their jurisdiction. All of the following standards must be met before a sterilization order can be entered:

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191. At least one member is to be a licensed attorney, at least two shall be women, at least two shall be minority group members, and at least one shall be a resident of the institution where the patient lives. *Id.* at 1384-85.

192. *Id.* at 1384.

193. 608 P.2d 635.

- I. [T]he individual is incapable of making his or her own decision about sterilization, and
- II. [T]he individual is unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future.
- III. [T]here is a need for contraception.
  - A. [T]he individual is physically capable of procreation, and
  - B. [T]he individual is likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy.
- IV. [T]he nature and extent of individual's disability, . . . renders him or her permanently incapable of caring for child, even with reasonable assistance.
- V. [T]here is no alternative to sterilization.
  - A. [A]ll less drastic contraceptive methods, including supervision, education and training, have been proved unworkable or inapplicable, and
  - B. [T]he proposed method of sterilization entails the least invasion of the body of the individual.
    1. [T]he current state of scientific and medical knowledge does not suggest either
      - a. that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or
      - b. that science is on the threshold of an advance in the treatment of the individual's disability.<sup>194</sup>

The Washington court makes clear that "to the greatest extent possible, the court [must elicit] and [take] into account the view of the incompetent individual."<sup>195</sup> The court must determine first whether the developmentally disabled individual is capable of making his or her own decision concerning sterilization. The heavy presumption existing against sterilization of an individual incapable of informed consent must be overcome by the person requesting sterilization. The presumption is most heavy in the case of an incompetent minor, "whose youth may make it difficult or impossible to prove by clear, cogent and convincing evidence that he or she will never be capable of making an informed judgment about sterilization or of caring for a child."<sup>196</sup>

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194. *Id.* at 641.

195. *Id.*

196. *Id.* Another recent case, *In re Grady*, 426 A.2d 467 (N.J. 1981), in which the New

The schemes delineated by the courts in *Wyatt* and *Hayes* reflect the potential for a more complete and careful assessment of the developmentally disabled individual's needs when the court acts pursuant to its inherent power rather than pursuant to the authority that the legislature vests in it by enacting a sterilization statute: With inherent power, the court is free to ignore the false eugenic and environmental assumptions which have plagued state legislators in the past. No longer is the court implementing some vague *societal* interest in sterilization articulated by the appropriate legislature; instead, the court is free to impose judicial standards which concentrate solely on the best interests of the developmentally disabled individual, *as an individual*, not as a member of a group which has been labeled inferior and set aside for mass sterilization.

Recognizing its exclusive duty to insure that the patient is subjected to sterilization only when the procedure is in the patient's best interests, the court may feel greater power to deny a sterilization request when all evidentiary standards have not been met:

Our conclusion that superior courts have the power to grant a petition for sterilization does not mean that power must be exercised. Sterilization touches upon the individual's right of privacy and the fundamental right to procreate. It is an unalterable procedure with serious effects on the lives of the mentally retarded person and those upon whom he or she may depend. Therefore, it should be undertaken only after careful consideration of all rele-

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Jersey Supreme Court acted on its own authority in ruling on a parental sterilization request, sets out in some detail the evidence standards which the petitioning parent must meet before sterilization can be ordered:

1. the possibility that the patient can become pregnant;
2. the possibility that the individual will experience trauma or psychological damage with pregnancy and birth or as a result of the sterilization operation;
3. the likelihood that the individual will voluntarily engage in sexual activity;
4. the inability of the individual to understand reproduction or contraception and the likely permanence of that inability;
5. the feasibility and medical advisability of less drastic means of contraception;
6. the advisability of sterilization at the present time rather than in the future;
7. the ability of the incompetent person to care for a child, or the possibility that the individual may be able to marry and, with the spouse, care for a child;
8. the possibility that scientific or medical advances may occur alleviating the necessity for sterilization;
9. a demonstration that the petitioners are seeking sterilization in good faith and primarily for the best interests of the individual rather than for their own or the public's convenience.

*Id.* at 483. See also *In re C.D.M.*, 627 P.2d 607 (Hawaii 1981).

vant factors.<sup>197</sup>

Additionally, in situations where the court acts pursuant to its own authority, the developmentally disabled individual is assured of receiving a full determination by a court experienced in resolving issues concerning the rights of citizens, no matter their capacity,<sup>198</sup> which is generally cognizant of the fundamental rights involved in the sterilization context, a prospect which is lacking in states where sterilization statutes provide for a hearing before a non-judicial tribunal, as well as in those states which fail to provide for a hearing at all. In the early part of this century, a proponent of eugenic sterilization wrote:

[T]here is the assumption that the board appointed . . . will be indifferent to its duty and malicious in the application of it. . . . It would be almost impossible for any appointing power to select a board composed of surgeons and other practitioners of medicine in which the majority could be of such character as to fulfill the conditions feared.<sup>199</sup>

Although the mechanism of a review committee can be extremely helpful in providing general expertise in medical and sociological matters and specific first-hand knowledge of the potential sterilization patient, there is no constitutional substitute for a full determination and final review by a competent court of law.

## V. CONCLUSION

Collective fear—of the unfamiliar, of the “other”—is responsible for the denial of procreative freedom to the developmentally disabled throughout history.<sup>200</sup> The fear posited itself in compulsory sterilization statutes based on false eugenic, environmental, thera-

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197. *In re Guardianship of Hayes*, 608 P.2d at 639 (citations omitted).

198. See *In re Grady*, 426 A.2d 467, 475 (N.J. 1981): “Our courts routinely make such decisions in adoption and child custody cases. (Citations omitted). Although we do not equate sterilization of incompetents with adoption or child custody, we think it sufficiently analogous to warrant close supervision by our courts.”

199. Kenyon, *supra* note 12, at 460.

200. “[Betty] Cochran refers to the removal of the right to make procreative choices from the retarded as an elitist fright. He [sic] argues that it reflects a fear of sexuality, a fear of the difference which is called inferiority and a fear for the quality of the species, and suggests that such fear in turn spawns hatred of races, classes and social categories. . . .” LAW REFORM COMMISSION OF CANADA, *supra* note 5, at 48 (citing Cochran, *Conception, Coercion and Control: Symposiums on Reproductive Rights of the Mentally Retarded*, 5 HOSP. AND COMM. PSYCH. 25 (May 1974)).

peutic, and fiscal assumptions. *These non-consensual sterilization statutes should be repealed*,<sup>201</sup> for, from a totally legal perspective, the statutes authorize an irreversible deprivation of a fundamental right without due process of law. From an ethical perspective, they simply cannot be tolerated any longer.

Consensual sterilization, whether ordered by a court under statutory or its own authority, should be performed on a controlled basis: (1) only after the full panoply of constitutional protection is afforded the individual, (2) only after the individual him/herself consents if capable of doing so, and if not, (3) only after creative devices for maximizing patient input are utilized, such as allowing the patient the right to refuse sterilization if capable of doing so, and (4) only after a determination is made that sterilization is in the individual's best interest, which, in all but rare circumstances, should be determined by medical necessity.

Perhaps most important, we need to understand that, in large measure, the way in which we perceive other individuals and situations determines the way in which we respond to them. Justice Holmes, and the Court for whom he wrote in *Buck v. Bell*, responded from a perception common to the day that developmentally disabled persons are capable of limited emotion and development and are manifestly unfit for society. Hopefully, as a result of research and education, our perceptions are changing, so that a contemporary Holmes may write:

We have seen more than once that the public welfare may call upon the best citizens for their lives only in limited situations. It would be strange, then, if it could call upon an extremely diverse group of individuals—some of which are our best citizens—for this great sacrifice in order to fulfill some invalid objective by some ineffective means. It is better for all the world, if instead of executing people who are different out of fear and misconception, society can learn to accept and nurture its different brothers and sisters, who have a lot to teach us all about life and hope, and come to realize that we are all different and retarded in many ways. The principle 'All humans are created equal' is broad enough to cover 'even those who are different.' Three generations of myth-conceptions are enough.<sup>202</sup>

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201. Many groups, including the American Civil Liberties Union Board of Directors advocate complete repeal. S. BRAKEL AND R. ROCK, *supra* note 17, at 209.

202. See text *infra* accompanying note 22 for original Holmes quote from which this prose is adapted.

